No. 15-8606

IN THE

# Supreme Court of the United States

GREGORY N. BELL,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers ("NACDL") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

## INTEREST OF *AMICUS CURIAE*

NACDL is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime. NACDL has a nationwide membership of approximately 9,200, and its many state, provincial, and local affiliate organizations encompass up to 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL frequently appears as *amicus curiae* before this Court and other federal and state courts, offering its perspective in cases that present issues of broad

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of NACDL's intent to file this brief. The parties have provided their written consent to the filing of this brief, and not objected to less than ten days notice. Copies have been filed with the Clerk's Office. Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

## SUMMARY OF ARGUMENT

This case presents a stark, clean and compelling vehicle for this Court to clarify and "resolve the contradictions in Sixth Amendment and sentencing precedent," *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (hereinafter "*Bell II*") (Millett, J., concurring in denial of rehearing en banc). The court below, bound by circuit precedent tracing back to *Watts v. United States*, 519 U.S. 148 (1997), permitted the use of acquitted conduct in sentencing. It did so notwithstanding the petitioner's argument that the Sixth Amendment prohibited the use of acquitted conduct, and this Court's caution that *Watts* is not a Sixth Amendment decision. The use of acquitted conduct from the same trial in sentencing is unjustified by *Watts*.

Punishing a defendant for acquitted crimes undermines the essential role of the jury. The use of acquitted crimes to calculate an initial Guidelines range deprives a defendant of his Sixth Amendment right to a sentence wholly authorized by the jury's verdict, from which a judge's authority to sentence derives. The use of acquitted conduct in enhanced sentencing ignores the Court's unequivocal pronouncements in *Rita v. United States*, 551 U.S. 338 (2007), and again in *Southern Union Co. v. United States*, 132 S.Ct. 2344 (2012), that any sentence must be based solely upon the facts found by the jury or admitted by the defendant.

The use of conduct of which a defendant was acquitted in the same trial to increase the sentencing Guidelines range violates the Sixth Amendment. A fact that increases a mandatory-minimum sentence, no less than a fact that increases a maximum sentence, is an offense element that jurors must find beyond a reasonable doubt, because the Sixth Amendment does not allow a judge, absent a jury, to find any fact that "alter[s] the prescribed range of sentences to which a defendant is exposed and do[es] so in a manner that aggravates the punishment." *Alleyne v. United States*, 133 S.Ct. 2151, 2161 n.2 (2013). Although advisory, the Guidelines continue to have "force as the framework for sentencing," *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013), and are the "starting point and the initial benchmark" for all sentence determination, *Gall v. United States*, 552 U.S. 38, 49 (2007). Correct calculation of the Guidelines range is the required first step in sentencing a convicted defendant. *Id.* Improper calculation by including acquitted conduct rejected by the jury constitutes procedural error.

Lower courts are bound by their post-*Watts* acquitted conduct precedent, even though the validity of those decisions is highly questionable in light of the Court's more recent Sixth Amendment jurisprudence. This Court should exercise its prerogative and use this case to clarify that the Sixth Amendment does not permit the use of acquitted conduct to increase a defendant's sentencing Guidelines range.

## ARGUMENT

### I. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO ADDRESS UNDER THE SIXTH AMENDMENT THE USE OF ACQUITTED CONDUCT FROM THE SAME TRIAL TO INCREASE A DEFENDANT'S SENTENCING GUIDELINES RANGE.

In *Watts v. United States*, 519 U.S. 148 (1997) (per curiam), decided three Terms before the Court's seminal decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court did not consider, "nor … was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment." *United States v. Booker,* 543 U.S. 220, 240 (2005). Rather, the Court "held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines." *Id.* Notwithstanding extensive and significant development of its Sixth Amendment jurisprudence since *Apprendi*, *see infra*, Section III; Petition ("Pet.") at 11-14, this Court has not considered the use of acquitted conduct under the Sixth Amendment since. *Bell II*, 808 F.3d 926, 932 (Millett, J. concurring in denial of rehearing en banc) (herein "Millett, J.") (the "Supreme Court has thus far declined to address the issue"). This case presents this Court with an ideal vehicle for considering this issue in light of *Apprendi* and the Court's more recent Sixth Amendment decisions, including *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

The record below is clear and stark. After a jury trial that spanned eight months of evidence and two months of deliberations, Pet. App. 116a (letter to trial court from Juror No. 6), petitioner was convicted of three counts of unlawful distribution of crack cocaine, and acquitted of ten other counts. Pet. App. 37a. Petitioner was acquitted of the narcotics and racketeering conspiracy charges, *United States v. Bell*, 795 F.3d 88, 92 (D.C. Cir. 2015) (hereinafter "*Bell I*"), of six additional counts of distribution of crack, and of two counts of using a communications facility in relation to a drug offense. Pet. at 3. Thus, the jury "authorized" punishment for three counts of distribution, *Bell I*, 795 F.3d at 92, but did not authorize punishment for the additional counts of distribution or the narcotics or RICO conspiracies. Nevertheless, the district court sentenced defendant as if the jury had found the facts it actually rejected.

Although the total amount of crack cocaine on the counts of conviction was "just 5 grams," *Bell II*, 808 F.3d at 929 (Millett, J.), the sentencing court attributed another 1.5 kilograms of crack to petitioner based on the acquitted conduct. The court attributed the additional volume of crack on two bases. First, the court found that petitioner was a member of a crack distribution conspiracy foreseeably involving at least 1.5 kilograms. Second, the court found other personal crack transactions that were part of the same scheme or plan as the offense of conviction.[2] Sent. Tr. 17-20, Pet. App. 60a-

[2] The court also attributed a firearm to defendant that had been offered as evidence for the acquitted narcotics conspiracy, adding two levels. *See* Pet. at 4.

63a. The jury, however, squarely rejected both asserted facts, acquitting petitioner of the two conspiracies involving narcotics distribution and the additional distribution charges.

Petitioner's Guidelines range based on the conduct of conviction was 51-63 months, *Bell II*, 808 F.3d at 929 (Millett, J.), but the sentencing court used a range of 235-293 months after including the acquitted conduct, and sentenced petitioner to 192 months. Sent. Tr. 60, 62, Pet. App. 103a, 105a. The sentencing court properly indicated that the Guidelines range calculation was required, though the Guidelines were advisory not mandatory. *Id.* at 54a-55a; *see Gall v. United States*, 552 U.S. 38, 48 (2007) (district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range). The sentencing court further indicated that its result after applying the Guidelines was higher than if he were to sentence petitioner without regard to the Guidelines at all. Sent. Tr. 60, Pet. App. 103a ("Unbridled by the sentencing guidelines, I would find here 13 years [*i.e.*, 156 months] to be a fair sentence. … But I am not unbridled by the guidelines.") Petitioner argued, and preserved his claim, that increasing his sentence by the use of acquitted conduct to calculate his Guidelines range infringed his Sixth Amendment right to trial by jury. Sent. Tr. 64, Pet. App. 107a; *Bell I*, 795 F.3d at 104-105.

The petition presents the issue simply and unencumbered. The proceedings below were not complex, nor did they involve multiple appeals and sentencings, *cf.* Petition, *Siegelman v. United States*,

No. 15-3531, at 2-8, 2015 WL 5562685 at *2-*8, (Sept. 17, 2015), *cert. denied*, 136 S.Ct. 798 (2016). Nor are there competing issues of burden of proof, *id.*, at i, 24-28, or of substantive unreasonableness, *cf. Jones v. United States*, 135 S.Ct. 8 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari). And the issue is narrowly presented, concerning only conduct of which the jury acquitted the petitioner in the very trial at which he was convicted by that same jury of other charges for which he is being sentenced.

This case presents this Court not merely with "another opportunity to take up this important, frequently recurring, and troubling contradiction in sentencing law," *Bell II*, 808 F.3d at 932 (Millett, J.), but an excellent vehicle. Indeed, Judge Millett concurred in the denial of rehearing en banc so as not to delay this Court's opportunity to do so. *Id.*

## II. IN ORDER TO PRESERVE THE ESSENTIAL ROLE OF THE JURY, A DEFENDANT'S SENTENCING GUIDELINES CALCULATION SHOULD NOT INCLUDE CONDUCT OF WHICH HE WAS ACQUITTED AT THE SAME TRIAL.

The use of acquitted conduct in enhanced sentencing ignores the Court's unequivocal pronouncements in *Rita v. United States*, 551 U.S. 338 (2007), and again in *Southern Union Co. v. United States*, 132 S.Ct. 2344 (2012), that any sentence must be based solely upon the facts found by the jury or admitted by the defendant, and that

consideration of facts not found by the jury unconstitutionally exposes a defendant to greater punishment. "[R]equiring juries to find beyond a reasonable doubt facts that determine the [sentence]'s maximum amount is necessary to implement *Apprendi's* 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Southern Union Co.,* 132 S. Ct. at 2351 (citing *Oregon v. Ice*, 555 U.S. 160, 168 (2009)).

The use of acquitted conduct to calculate an initial Guidelines range deprives a defendant of his Sixth Amendment right to a sentence wholly authorized by the jury's verdict. *See Cunningham v. California*, 549 U.S. 270, 290 (2007) ("If the jury's verdict alone does not authorize the sentence . . . the Sixth Amendment requirement is not satisfied."); *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (*Apprendi* "ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict"); *Apprendi*, 530 U.S. at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.")

Punishing a defendant for acquitted crimes undermines the essential role of the jury. The Court has called it an "absurd result" that a person could be sentenced "for committing murder, even if the jury convicted him only of illegally possessing the firearm used to commit it-or making an illegal lane change while fleeing the death scene." *Blakely*, 542

U.S. at 306.[3] And by sentencing for acquitted crimes, the jury's verdict is, as a matter of perception and for all practical purposes, overturned. A sentence such as that imposed upon petitioner surely would lead a conscientious juror to wonder whether the jury's role was nothing but window dressing.[4]

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[3] Examples of this "absurd result" include *United States v. Stroud*, 673 F.3d 854 (8th Cir. 2012) (affirming sentence over Sixth Amendment challenge on basis of prior precedent where court sentenced defendant for murder, even though the jury had convicted him only of being a felon in possession of a firearm and he had been acquitted of the murder), *cert denied*, 133 S.Ct. 1581 (2013), and *Marlowe v. United States*, 555 U.S. 963 (2008) (Scalia, J. dissenting from denial of certiorari) (jury verdict supported no more than involuntary manslaughter through criminal negligence, with a guidelines range of 51-63 months, yet sentencing judge raised offense level based on finding of malice aforethought necessary for second degree murder, and sentenced defendant to life in prison).

[4] *See United States v. Canania*, 532 F.3d 764, 778 & n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *see also United States v. Ibanga,* 454 F. Supp. 2d 532, 543 (E.D. Va. 2006) ("It would only confirm the public's darkest suspicions to sentence a man to an extra ten years in prison for a crime that a jury found he did not commit."), vacated, 271 F. App'x 298 (4th Cir. 2008); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.'"). *Cf. United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) ("Many judges and commentators have similarly argued that using acquitted conduct to increase a defendant's sentence undermines respect for the law and the jury system.").

And indeed it has in this very case. *See* Pet. App. 116a (letter from juror no. 6) ("It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it is due.") "What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight." *Id.* at 117a.

All nine justices agreed in *United States v. Booker,* 543 U.S. 220 (2005), that, at least as to the elements of crimes of which the defendant is accused, the jury must confirm the truth of every accusation. 543 U.S. at 239; *id.* at 327-28 (Breyer, J., dissenting). Indeed, the Framers could not have intended to guard against governmental oppression through criminal juries with ultimate power to confirm or reject the truth of every accusation, and to partially acquit to lessen unduly harsh punishment, *see Jones v. United States*, 526 U.S. 227, 247 (1999) - only to allow a judge to then effectively nullify the jury's acquittal. Doing so eviscerates the "fundamental reservation of power" in the jury and prevents it from "exercis[ing] the control that the Framers intended." *Blakely*, 542 U.S. at 306. Like other "'inroads upon the sacred bulwark of the nation,'" the use of acquitted crimes to calculate the Guidelines range is "'fundamentally opposite to the spirit of our constitution.'" *Booker*, 543 U.S. at 244 (quoting 4 Blackstone 343-44).

Numerous commentators have stressed that the use of acquitted conduct in sentencing directly undermines the role of the jury in our legal system, and, indeed, our democratic system at large. *See, e.g.,* James J. Bilsborrow, *Sentencing Acquitted*

*Conduct to the Post-Booker Dustbin,* 49 Wm. & Mary L. Rev. 289, 333 (2007) ("When laypersons see that the product of a jury's fact-finding may be affirmatively set aside by a single judge, the civic value of jury service suffers. In this way, … judicial consideration of acquitted conduct harmfully impacts the jury's intended democratic accountability function."); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 26 (2016) ("[C]ritics of acquitted conduct emphasize the way it frustrates the role of citizen participation in the criminal justice system, robbing that system of the democratic legitimacy conferred by the jury's role, and diminishing the civic value of juror participation in the criminal justice process."); Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L. Rev. 675, 723 (2014) ("[Acquitted conduct sentencing] repudiates the jury's verdict [and] undermines the juror's role … and is the type of deviation from the public's understanding of a defendant's right to a jury trial that could undermine public confidence in the criminal justice system.") (citation omitted). The use of acquitted conduct in sentencing will continue to erode the public trust in our legal system if allowed to continue.

## III. INCREASING A DEFENDANT'S SENTENCING GUIDELINES RANGE BY USE OF ACQUITTED CONDUCT VIOLATES THE SIXTH AMENDMENT.

In *Alleyne v. United States*, the Court held that a fact that increases a mandatory-minimum sentence, no less than a fact that increases a maximum sentence, is an offense element that jurors must find beyond a reasonable doubt. *Alleyne,* 133 S. Ct. 2151, 2155 (2013). In doing so, the Court held that the Sixth Amendment does not allow a judge, absent a jury, to find any fact that "alter[s] the prescribed range of sentences to which a defendant is exposed and do[es] so in a manner that aggravates the punishment." *Id.* at 2162. While *Alleyne*'s requirement applies directly to statutory minimums, "it is hard to understand why the same principle would not apply to dramatic departures from the Sentencing Guidelines range based on acquitted conduct." *Bell II*, 808 F.3d at 931 (Millett, J.).

The Sentencing Guidelines continue to have "force as the framework for sentencing." *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013). The Guidelines are the "starting point and the initial benchmark" for all sentence determinations, *Gall*, 552 U.S. at 49, and correct calculation of the sentencing Guidelines range is the required first step in sentencing a convicted defendant. *Id.* Failure to properly calculate a defendant's Guidelines range constitutes procedural error. *Peugh*, 133 S.Ct. at 2080. Any departure or variance must be explained. *Rita*, 551 U.S at 347, 356-59. Although the Guidelines are permissive, not

mandatory, and a sentencing court must consider the sentencing factors laid out in 18 U.S.C. §3553(a), a sentence within the Guidelines range may be presumed to be reasonable on appeal. *Gall*, 552 U.S. at 51. And in the "vast majority of cases" the sentence is within the Guidelines range or below on a Government motion. *Peugh*, 133 S.Ct. at 2084.

In *Alleyne*, the Court rejected the government's argument that facts mandating the imposition of a mandatory minimum sentence need not be found by a jury so long as the ultimate sentence did not exceed the maximum set by the statute of conviction. "Elevating the low-end of a sentencing range," the Court explained, "heightens the loss of liberty associated with the crime[.]" *Alleyne*, 133 S.Ct. at 2161. As a result, "[i]t is no answer to say that the defendant could have received the same sentence with or without that fact." *Id.* at 2162.[5]

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[5] Similarly, the *Blakely* court rejected the argument that *Apprendi* did not apply there because Blakely's 90-month sentence was below the 10-year statutory maximum. *Blakely,* 542 U.S. at 303. The Court held that the relevant "'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." *Id.* at 303-04 (citation omitted, emphasis in original). Thus, for *Apprendi* purposes, the Guidelines sentencing range for the crime to which Blakely pleaded guilty was the applicable statutory maximum, and the judicially-imposed "deliberate cruelty" finding that increased the maximum sentence from 53 to 90 months violated the Sixth Amendment, even though it did not exceed the 10-year

Whether the law is statutory, as was the mandatory minimum in *Alleyne*, or judge-made, as in the calculation of the sentencing Guidelines range, the inclusion of acquitted conduct impinges on the jury as surely in the latter as in the former. *See* Lucius T. Outlaw III, *Giving an Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing,* 5 U. Denv. Crim. L. Rev. 173, 189 (2015) ("it makes no logical or constitutional sense … [to] prohibit[] a judge from using a fact rejected by a jury to impose a mandatory minimum sentence, but permit[] a judge to use a jury rejected fact to impose a sentence that is *multiple times* what the defendant would otherwise receive under the Guidelines if not for that fact.") (emphasis in original).

The Guidelines still have legal force, and a fact that increases the offense level increases the prescribed penalty the defendant faces. *Peugh,* 133 S.Ct. at 2078-80. The fact that a judge could exercise discretion to impose a sentence above the Guidelines range does not negate the constitutional problem judicial fact-finding causes. Here, petitioner's 192-month sentence, over three times longer than the top of the Guidelines range for the crimes of conviction, *see Bell II*, 808 F.3d at 929 (Millett, J.), is a

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maximum sentence for second-degree assault. *Id.* at 303. Taken to its logical conclusion, this approach requires that a jury find the conduct used to set or increase a defendant's sentence "at least in structured or guided-discretion sentencing regimes." *Bell II*, 808 F.3d at 927 (Kavanaugh, J.).

quintessential instance where the "tail" has wagged the "dog." *Apprendi*, 530 U.S. at 495.

Based on the jury verdict, petitioner's advisory Guidelines range was 51-63 months in prison. *Bell II*, 808 F.3d at 929 (Millett, J.). The sentencing judge, having found that petitioner distributed substantially more narcotics and possessed a firearm, could have exercised his discretion in two ways. He could have sentenced petitioner at the top of the Guidelines range, or he could have considered imposing a longer sentence pursuant to Guidelines § 5K2.0 *et seq*. (departures) or 18 U.S.C. § 3553(a) (sentencing factors). But if he took the latter course, the criteria for imposing a longer sentence would have been more demanding, *see Gall*, 552 U.S. at 50 ("a major departure should be supported by a more significant justification than a minor one"), and the level of appellate scrutiny greater, *id.* at 51. Instead, the sentencing court used petitioner's acquitted conduct to raise his Guidelines range dramatically. After *Alleyne*, however, a defendant's properly calculated Guidelines range that includes conduct acquitted by the jury is procedural error.

## IV. CIRCUIT PRECEDENT EXTENDING *WATTS* TO ALLOW THE USE OF CONDUCT OF WHICH THE DEFENDANT WAS ACQUITTED AT THE SAME TRIAL TO CALCULATE A DEFENDANT'S SENTENCING GUIDELINES RANGE SHOULD BE ABROGATED.

This Court has instructed that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). In accord with this precept, the Courts of Appeals have been constrained by their prior precedent, based on *United States v. Watts*, 519 U.S. 148 (1997), to allow the use of acquitted conduct to increase sentences notwithstanding that this Court's later Sixth Amendment jurisprudence severely calls into question the continuing validity of W*atts* in this context. The paradox thus created is further reason to grant the petition.

Despite the Court's more recent Sixth Amendment jurisprudence, circuit courts have continued to allow the use of acquitted conduct to enhance criminal sentences, relying on the Court's pre-*Apprendi* decision in *Watts*—which held that a sentencing court's consideration of acquitted conduct was not a violation of the Double Jeopardy

Clause.[6] 519 U.S. at 157. *Watts*, however, is a per curiam decision and readily distinguishable, as no Sixth Amendment claim was raised. *Booker*, 543 U.S. at 240 & n.4.

In a series of decisions, beginning three Terms later with *Apprendi v. United States,* 530 U.S. 466 (2000), this Court has demonstrated that the use of acquitted conduct in sentencing per *Watts* is on highly questionable constitutional footing. In light of these developments several Justices of this Court, numerous lower court judges, and a significant number of commentators have called on this Court to clarify the constitutionality of acquitted conduct sentencing. The "time is ripe." *Bell II,* 808 F.3d at 929 (Millett, J.).

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[6] *See e.g., United States v. White*, 551 F.3d 381, 383-84 (6th Cir. 2008) (*en banc*); *United States v. Mercado*, 474 F.3d 654, 657 (9th Cir. 2007) (The "core principle of *Watts* lives on and [a] district court [may] constitutionally consider ... acquitted conduct"); *United States v. Dorcely*, 454 F.3d 366 at 371-72 (D.C. Cir. 2006); *United States v. Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006) ("Post-*Booker*, the law has not changed ...; acquitted conduct, if proved by a preponderance of the evidence, still may form the basis for a sentencing enhancement"); *United States v. Jones*, 194 F. App'x 196, 197-98 (5th Cir. 2006); *United States v. Hayward*, 177 F. App'x 214, 215 (3d Cir. 2006); *United States v. Ashworth*, 139 F. App'x. 525, 527 (4th Cir. 2005) (*per curiam*); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005) ("[D]istrict courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct....").

Just last Term, in a dissent from the denial of certiorari, three Justices clearly articulated the need for this Court to clarify its position regarding acquitted conduct sentencing in light of its recent Sixth Amendment decisions. *See Jones v. United States*, 135 S.Ct. 8 (2014) (Scalia, J., joined by Thomas & Ginsburg, JJ., dissenting from denial of certiorari). Justice Scalia lamented that "the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range." *Id.* at 9 (emphasis in original). Justice Scalia further urged that this Court "grant certiorari to put an end to the unbroken string of cases disregarding the Sixth Amendment." *Id.*

In this case, Judges Kavanaugh and Millett each wrote to express their concern regarding this unconstitutional practice, and to emphasize the need for this Court to provide guidance regarding the constitutionality of acquitted conduct sentencing. *See Bell II,* 808 F.3d at 928-29 (Kavanaugh, J. and Millett, J., concurring in denial of rehearing en banc). Judge Kavanaugh described the practice of using acquitted conduct to impose higher sentences as a "dubious infringement on the rights to due process and to a jury trial." *Id.* at 928. Judge Millett echoed these concerns, conceding that she was bound by circuit precedent, but noted that "the time is ripe for the Supreme Court to resolve the contradictions

in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation." *Id.* at 929.

Other circuit judges have made similar statements regarding the binding effect of *Watts*-based circuit precedent and the need for clarification from this Court.[7] And legal scholars have also recognized the need for this Court to address this issue directly, arguing that, in the absence of intervention by this Court, lower courts around the country will continue their adherence to questionable *Watts*-based precedent.[8]

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[7] *See United States* v. *Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("I . . . concur in [the majority's] sentencing decision only because I am bound by Circuit precedent ... . I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment . . . ."); *United States* v. *Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("Bound by ... precedent, I reluctantly concur . . . . I write separately to express my strongly held view that consideration of 'acquitted conduct' to enhance a . . . sentence is unconstitutional.").

[8] *See* Outlaw, *Giving an Acquittal Its Due, supra,* 5 U. Denv. Crim. L. Rev. at 194-95 ("For too long, courts have rested on *Watts* to justify this invidious practice [of acquitted conduct sentencing]. In *Watts*, however, the Supreme Court side-stepped the Sixth Amendment . . . a maneuver that is no longer available now that [*Apprendi, Blakely, Booker,* and *Alleyne* have been decided]."); Mark T. Doerr, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 Colum. Hum. Rts. L. Rev. 235, 271-72 (2009) (Supreme Court's refusal to grant certiorari on an acquitted conduct case will likely result in extended period of time

The petition presents another instance of this paradox. The court below rejected petitioner's challenge to the use of acquitted conduct to increase his Guidelines sentencing range in reliance on *United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014). *Bell I*, 795 F.3d 88, 104-105 (D.C. Cir. 2015). It held that "[a] sentencing court may base a sentence on acquitted conduct, 'even when consideration of the acquitted conduct multiplies a defendant's sentence severalfold,' so long as the sentence does not exceed the statutory maximum...." *Id.* at 105 (citing *Jones,* 744 F.3d at 1369). *Jones* in turn relied on *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008) (citing *Watts*), and *United States v. Dorcely*, 454 F.3d 366, 371 (D.C. Cir. 2006), for the principle that a sentencing judge may consider acquitted conduct. Both *Settles* and *Dorcely* relied on *Watts* for that proposition. *Settles*, 530 F.3d at 923; *Dorcely*, 454 F.3d at 372.

Even though bound by prior circuit precedent, *Bell II,* 808 F.3d at 929 (Millett, J.), the court below erred by relying on *Watts*-based circuit precedent that is no longer good law in light of *Alleyne* and other post-*Apprendi* Sixth Amendment sentencing cases decided by this Court.

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before Court addresses the issue and changes lower court practice); James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 Wm. & Mary L. Rev. 289, 321 (2007) ("as both a constitutional matter and a normative matter the consideration of acquitted conduct at sentencing should be prohibited and *Watts* should be explicitly overruled.")

Lower courts attempting to reconcile *Watts* with the Court's subsequent Sixth Amendment jurisprudence have suggested that the Sixth Amendment does not prevent a district court from relying on acquitted conduct in applying an advisory Guidelines system. "For Sixth Amendment purposes, the relevant upper sentencing limit established by the jury's finding of guilt is thus the *statutory* maximum, not the advisory Guidelines maximum." *Settles*, 530 F.3d at 923 (emphasis in original).[9]

But that view cannot be reconciled with the Court's own descriptions of the scope of the jury's role since *Apprendi*, including *Blakely, Booker* and *Alleyne*. For example, the *Blakely* Court rejected the state's claim that for Sixth Amendment purposes the "statutory maximum" was the 10-year maximum penalty for second degree assault, rather than the lesser range for the crime to which the defendant pled guilty, 542 U.S. at 303, *see infra* note 5. The Court explained that for *Apprendi* purposes "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04

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[9] See *also White*, 551 F.3d at 384 ("In the post-*Booker* world, the relevant statutory ceiling is no longer the Guidelines range but the maximum penalty authorized by the United States Code"); *United States v. Grier*, 475 F.3d 556, 566 (3d Cir. 2007) (en banc) (same); *United States v. Jiminez*, 498 F.3d 82, 87 (1st Cir. 2007) (same); *United States v. Green*, 162 F. App'x 283, 284 (5th Cir. 2006) (per curiam) (same); *United States v. Crosby*, 397 F.3d 103, 109 n.6 (2d Cir. 2005) (same); *United States v. Duncan*, 400 F.3d 1297, 1303 (11th Cir. 2005) (same); *United States v. Smith*, 413 F.3d 778, 781 (8th Cir. 2005) (same).

(quoting *Apprendi*, 530 U.S. at 488) (emphasis in original). Similarly, as demonstrated in Section III, *infra*, in *Alleyne*, the Court held that the relevant statutory range, for which a jury verdict was required for sentencing, was that of the mandatory minimum, even though that was itself less than the maximum for the offense of conviction. *Alleyne*, 133 S.Ct. at 2155.[10]

Thus, if the jury's fact-finding supports imposition of a sentence within a "defined range," the Sixth Amendment will not stand as an obstacle to the imposition of a sentence within that defined range. But "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment and that exceeds his proper authority." *Blakely*, 542 U.S. at 304 (internal quotations and citations omitted).

In the present case, the facts found by the jury supported imposition of a Guidelines range sentence of 51-63 months. Pet. at 3. Within that range, the district court had broad discretion to impose a sentence consistent with the Sixth Amendment. What the sentencing judge could not do, however, was conclude that petitioner committed conduct *the*

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[10] Nor did *Booker* hold that under the admittedly "advisory" Guidelines, judicial fact-finding to impose a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. Instead, in *Booker*, the Court held that "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." 543 U.S. at 233. Here, the sentencing court found the facts setting the defined range.

*jury found he did not commit* to support the calculation of an entirely different "defined range," one that resulted in a nearly three-fold increase in petitioner's sentence. *See Booker*, 543 U.S. at 232 (the Sixth Amendment guarantees a "right to have the jury find the existence of 'any particular fact' that the law makes essential to [the defendant's] punishment") (quoting *Blakely,* 542 U.S. at 301). *See also infra*, Section III.

For the reasons set forth above, it is time for this Court to make clear that the use of acquitted conduct from the same trial to increase a defendant's Guidelines range is prohibited by the Sixth Amendment.

This troubling "incursion [of circuit precedent] on the Sixth Amendment 'has gone on long enough.'" *Bell II*, 808 F.3d at 929 (Millett, J.) (quoting *Jones,* 135 S.Ct. at 9 (Scalia, Thomas and Ginsburg, JJ., dissenting from denial of certiorari)). As recognized by two sitting Justices, *Jones*, 135 S.Ct. at 8 (Thomas & Ginsburg, JJ., joining Scalia, J., dissenting from denial of certiorari), and by two members of the court below, this Court should not let this troubling and unjust incursion continue.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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